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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 86

LOUIS ZEMEL, *Appellant*,

v.

DEAN RUSK, SECRETARY OF STATE, and ROBERT F.
KENNEDY, ATTORNEY GENERAL

On Appeal from the United States' District Court
for the District of Connecticut

BRIEF FOR ANATOL SCHLOSSER, AMICUS CURIAE

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THE INTEREST OF AMICUS

Anatol Schlosser, the *amicus curiae*,¹ has been indicted in the Eastern District of New York (No. 64 Cr. 137) on a charge of conspiring to violate section

¹ The consents of the parties to the filing of this brief have been filed with the Clerk.

215 of the Immigration and Nationality Act of 1952, 66 Stat. 163, 190, 8 U.S.C. 1185, by agreeing to induce American citizens to depart from the United States for Cuba without bearing passports specifically validated for travel to Cuba.²

This appeal questions the authority of the Secretary of State to impose geographical restrictions on the travel of American citizens by providing that passports are not valid for travel to Cuba unless specially validated for that purpose. One member of the three-judge court below, Judge Clarie, held that such authority was derived from, among other sources, section 215. The appeal also seeks to enjoin the Attorney General from utilizing section 215 to enforce the Secretary's restrictions.

Amicus believes that section 215, properly construed, does not prohibit departures from the United States for off-limit destinations by citizens bearing passports which by their terms are not valid for travel to such areas. If amicus is correct, the indictment against him is clearly invalid, there being no other statute which makes it an offense to disregard passport territorial limitations.³ Trial of the indictment against amicus and his co-defendants has been postponed pending disposition of the present appeal.

² The indictment also charges three other defendants with the same conspiracy and on substantive counts that they travelled to Cuba without specially validated passports.

³ Amicus also believes, but does not brief the point, that there is no source of any kind for the asserted authority of the Secretary of State to limit the destinations for which passports are valid.

ARGUMENT

Section 215 Does Not Prohibit Travel to Restricted Destinations by Citizens Bearing Passports Not Specifically Validated for Such Travel.

Section 215(b) provides that while there is in force a prescribed Presidential proclamation,

"it shall, except as otherwise provided by the President, and subject to such limitations and exceptions as the President may authorize and prescribe, be unlawful for any citizen of the United States to depart from or enter, or attempt to depart from or enter, the United States unless he bears a valid passport."

A wilful violation of this provision is punishable by imprisonment up to five years and a fine up to \$5,000. 18 U.S.C. 1185(c).

Under State Department regulations, a passport is not necessary for travel between the United States and any place in the Western Hemisphere except Cuba. 22 C.F.R. 53.2 and 53.3(b). The exception requiring a passport for travel to Cuba was provided by an amendment to the regulations on January 16, 1961. State Dept. Reg. 108.456, 26 Fed. Reg. 482. Simultaneously, the Secretary of State issued Public Notice 179, 26 Fed. Reg. 492, which announced:

"Hereafter United States passports shall not be valid for travel to or in Cuba unless specifically endorsed for such travel under the authority of the Secretary of State or until this order is revoked."

There are, therefore, two types of "valid" passports:
(1) Passports in standard form, which are valid to most places in the world, but not Cuba and a handful

of other countries; and (2) Passports which are valid for travel to Cuba (or other restricted countries), by virtue of special endorsement, as well as for travel to other places. It is the position of the government, as exemplified by its indictment of amicus, that the term "a valid passport," as used in section 215(b), means a passport which is valid for the particular destination. Accordingly, the theory runs, departure from the United States for Cuba by an American citizen is a criminal offense even if he bears a generally valid passport, if the passport has not been specifically validated for travel to Cuba.

The government's construction of section 215 is incorrect on several grounds.

1. Section 215(b) must be narrowly construed, both because of the familiar doctrine to that effect regarding penal statutes and because it is a legislative curtailment of a fundamental human liberty, the right to travel. *Kent v. Dulles*, 357 U.S. 116, 129.

The narrow, and indeed the common-sense, meaning of the term "a valid passport" in section 215 is satisfied by the kind of passport which is standard, which is issued to virtually all citizens who obtain passports, and which is indisputably valid for travel to all but a few countries of the world. The statute refers to a valid passport. It does not differentiate between various kinds of valid passports. Still less does it require a passport which is valid for a particular ultimate destination as well as for everywhere else. Indeed, section 215(b) would be intolerably vague if "a valid passport," as used therein, excludes the standard valid passport whenever the departing traveller has in mind an off-limits destination. This is particularly true if, as is alleged in the indictment against amicus, the off-

limits destination is to be reached by way of other countries, for travel to which the passport is concededly valid.

2. It is inconsistent with the purpose of section 215 (b) to make its application depend on the destination of a departing citizen and to use it to enforce the State Department's geographical restrictions on the use of passports. The section is concerned solely with entries into and departures from the United States. It says nothing about, and is not interested in, the place which the entering citizen left or the place to which the departing citizen is bound. The statute was intended to permit the sealing of our borders in time of war or national emergency so as to protect the nation from persons seeking to engage in dangerous missions, such as espionage, sabotage and the like.⁴ It is contrary to this purpose to utilize the statute not to prevent people from leaving the country, but to control the direction of the travel of persons whose non-dangerous intentions have been attested by the issuance to them of passports good for virtually all countries of the world. The

⁴ The House Committee on the Judiciary, in reporting the Immigration and Nationality Act, stated that sec. 215 adopted Presidential powers "in practically the same form as they now appear in the act of May 22, 1918 (40 Stat. 559)." H. Rept. No. 1365, 82nd Cong., 2d Sess., appearing in 2 U.S.C. Cong. & Adm. News, 1952, p. 1708. Since sec. 215 is essentially a reenactment of the 1918 Act, the legislative history of the 1918 Act, is meaningful. Cf. *Allen v. Grand Central Aircraft Co.*, 347 U.S. 535, 541. The 1918 Act was entitled "An Act to prevent in time of war departure from or entry into the United States contrary to the public safety." The House Foreign Affairs Committee explained the need for the 1918 travel controls over citizens primarily in terms of a desire to prevent "renegade Americans" from engaging in "the transference of important military information" to Germany. H. Rept. No. 485, 65th Cong., 2d Sess., pp. 2-3.

borders of the United States are not sealed by measures which permit people to leave the country for all but a few destinations. Such measures, on the contrary, are an attempt to seal the borders of the latter places of destination.

Section 215(b) would be extended far beyond its purpose of preventing dangerous activities by sealing our borders if it should be applied to enforce the geographical limitations imposed by the State Department on passports. For those limitations are adopted not solely, or even primarily, for the purpose of preventing persons from engaging in dangerous missions. Instead, they are generally adopted to promote other reasons of foreign policy. Such is precisely the case with respect to the Department's restriction on the use of passports for travel to Cuba. When the Secretary of State first adopted that restriction on January 16, 1961, he announced its purpose as follows:

"In view of the conditions existing in Cuba and in the absence of diplomatic relations between that country and the United States of America I find that the unrestricted travel by United States citizens to or in Cuba would be contrary to the foreign policy of the United States and would be otherwise inimical to the national interest." (State Dept. Public Notice 179, 26 Fed. Reg. 492.)

And in an accompanying press release, the Department attributed its placing of Cuba off-limits to the government's "inability, following the break in diplomatic relations between the United States and Cuba, to extend normal protective services to Americans visiting Cuba." (State Dept. Press Release No. 24, Jan. 16, 1961.) Not a word was said to the effect that the restrictions were required to protect the security against dangerous activities of would-be travellers.

Moreover, it is an anachronism now to use section 215(b) even for its limited purpose of enforcing prohibitions on departures and entry without passports. For the emergency need to seal the borders which the section contemplates is belied for the present by the fact that passports are freely granted in the many thousands and by the elimination of the need for passports to depart to any place in the Western Hemisphere other than Cuba. The fact that there may be, as there always is, an "emergency" in our relations with other states does not mean that there is an emergency requiring the sealing of our borders. Palpably, in view of the extensive freedom of travel now allowed and enjoyed, the latter emergency no longer exists. The emergency having terminated, so has the emergency legislation. *Chastleton Corp. v. Sinclair*, 264 U.S. 543.

3. The government itself has on prior occasions recognized that section 215(b) is not available to enforce geographic restrictions on the use of passports. Thus in 1952, when the State Department announced that passports would not be valid for travel to various Communist countries, it stated: "In making this announcement, the Department emphasized that this procedure in no way forbids American travel to these areas." 26 State Dept. Bulletin No. 672, May 12, 1952, p. 736. In a Special Message of July 7, 1958, the President requested Congress to enact passport-control legislation. He there urged that the Secretary of State should be given "clear statutory authority to prevent Americans from using passports for travel to areas where there is no means of protecting them, or where their presence would conflict with our foreign policy objectives or be inimical to the security of the United

States." (3 U.S.C. Cong. & Adm. News, 85th Cong., 2d. Sess., 1958, p. 5465.)

4. The government's construction of section 215 obviously raises serious constitutional questions in addition to that of vagueness. Under that construction, the Secretary of State can, with the aid of criminal penalties, limit the constitutional right to travel without legislative guide lines, for unexpressed policy considerations, and with exceptions for such persons as he may favor.

Respectfully submitted.

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